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Towards Reform: Contexts and Challenges of Indefinite Sentences

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Introduction

This working paper seeks to clarify the key contexts in which the recent history of indefinite detention for people convicted of crimes should be placed and to suggest ways of interpreting the kinds of evidence and analysis which future inquiries or reviews may wish to consider.

Here it is argued that the main contexts are, in order of scope and generality:

A. Socio-political structures and state developments
B. Operations of the state: law and administration
C. Initiatives, reactions and effects at the individual level

The paper gives most attention to contexts A and B on the grounds that these contain the sources of the fundamental problems to be resolved, while evidence about C continues to be documented. It is agreed that the recent history of indefinite detention is complex, with several strands that over time have become knotted, hindering lucid and effective solutions. In this paper an attempt has been made to identify some of the most convoluted, and to trace their origins and implications. Inevitably, Imprisonment for Public Protection (IPP) will loom large, though future work will seek lessons from other jurisdictions and from similar sentences.

The act of clarification focuses our minds on what is entailed in challenging the conventional wisdom around political and institutional understandings of indeterminate preventive detention. As we shall see, a cluster of such sentences have emerged from a longstanding political context and sit inside a range of measures and technologies which are embedded in criminal justice as we know it. The account is neither reassuring nor redemptive, but its intention is to present a foundation for a cogent criticism of that history and a prospective agenda for a future alternative.

A. The socio-politics of law and criminal justice: change and conjunctures in history

Society, the state and law

Conventionally, it is assumed that the powers of the state function to manage disorder and ensure civil peace. In its most conservative form, the Hobbesian bargain means submitting to Leviathan instead of enduring a war of all against all. These powers are formulated into laws, regulations and procedures which codify the state's actions. They give rise to institutions for managing law-breakers, from transportation to confinement and supervision.

The social composition of the detained populations reveals the structural alignment of the state towards the general population, as well as the conditions of life in society. Historically, institutions of confinement have processed 'target populations': sections of a 'surplus' working class; racial and sexual minorities; wanderers and 'outsiders'.

In general, the evolution of society determines the focus of state actions and the configuration of measures. Within this context lie the philosophies and sentiments which are meant to legitimise measures of punishment and control, the most prominent of which reflect the values of dominant groups. Here, ideas such as 'paying a debt to society' resonate with the priorities of the social order.

The institutions of law present a framework for systematising the state's response to disorder, establishing roles and authorities which enable bodies, agencies and representatives to conduct the business of the state. The framework creates a platform for consistent operation, with modification limited and controlled. In issuing sentences of imprisonment, decisions are made with the authoritative stamp of a judge, which permits review or alteration only under certain conditions. Hence, sentencing legislation constitutes landmarks which oversee significant periods of criminal justice practice.

Indeterminate sentences are not unprecedented; they possess a definite history which, over long periods in the past, has seen variations in their use. Reviewing the recent history of criminal justice policy, however, it seems that an upsurge of sentences involving indeterminate detention can be understood as part of a growth in more restrictive interventions, which speak to the influences of populism and authoritarianism: both political reactions to social and economic changes over the past half-century. Analysts of modern politics have turned attention to themes of populism and authoritarianism, as alternatives to ideas of liberal democracy, acknowledging the character of many otherwise divergent currents and regimes throughout the world in recent decades. Just as populism can come from different sections of a political spectrum, its relation to authoritarianism also has to be established after careful examination and cannot be assumed. There is a lively literature on the socio-economic context for recent political trends: do the 'people' experience problems which propel political action? Or do leaders seeking power manipulate public perceptions? The more plausible perspectives emphasise the dynamic interconnections between popular discontent and political leadership, each level reacting to the general pressures of globalisation and open markets combined with reductions in social safety nets (e.g. Rodrik, 2018).

Whatever the final judgement on these questions, it is reasonable, first of all, to argue that the hardening of criminal law and its practices has been a political project, which does not primarily respond to the intrinsic pressures or demands of a working criminal justice system, but seeks to identify a contemporary case for changes 'in the name of the people'. The point here is that proposals carry a flag which is meant to rally wide support. Secondly, as we shall see, such a movement in the penal field is often better described as 'politicians' populism', in the sense that established politicians have sought a particular advantage by appealing to public concern and interest. Fuelled by political competition, therefore, a spiral of innovations will follow as political leaders vie for the same territory. It has been widely asserted that, in the case of criminal justice trajectories, we are faced with something that can be labelled as 'authoritarian populism': the use of typical phrases like 'protecting the public' in order to argue for a stream of restrictive and punitive measures (e.g. Annison, 2015; Annison and Guiney, 2022). What this political drive neglects are possibilities for measures of social protection and safety which reduce risks of harm; instead it seeks to impose enhanced controls and sanctions on captured wrongdoers.

Hegemony, social relations and crime

A founding analysis of the deeper origins of recent authoritarianism in social policy and criminal justice argued that responses to the 'mugging' phenomenon of the 1970s were shaped by a political crisis ultimately conditioned by class relations (Hall *et al,* 1978).

The thesis of *Policing the Crisis* was set within a Gramscian interpretation of politics and the state in which dominant classes reach out across the social formation and fashion a hegemonic bloc. The political representation of the bloc contains a range of social actors, in parties, the media, civil organisations and so on, whose agreed positions can be displayed as a natural consensus.

Historical conjunctures are important in shaping the character of a political project and its targets. As the 1970s began, a volatile political climate clouded by protest, industrial action, financial turbulence and growing unemployment, called for a new political mobilisation, which abandoned the corporatist coalitions of the post-war consensus and sought to exert control over any insurgency.

The mugging phenomenon was cast as a drama in which harsher punishments were necessary to combat this purportedly new and frightening form of crime, but it was drawn into a much wider campaign about the need for order. Police, courts and prisons were mobilised in order to combat the alleged threat, which had particular connotations for ethnicity as areas of Black settlement, like Brixton, were targeted. The labelling of Black communities has persisted for many years and influenced reactions and responses in the form of street disturbances and rioting as well as campaigns for justice.

At the same time the notorious 'spycops' were given a licence to infiltrate groups held to be subversive of the state – another target of concern. Their practices have only recently begun to come into the full light of day.

The call for order in the 1970s laid the basis for the more strident regime of Thatcherism, with its focus on 'the enemy within'. The rise of the radical Right was founded on exploiting a range of discontents in popular language which connected widely across the class spectrum, generating its own kind of populism.

The 1980s and 1990s were marked by developments in the USA which had wider reverberations elsewhere. While poverty mounted in the cities, a 'war on drugs' took hold: numbers under correctional supervision increased rapidly, ushering in the realm of a New Penology. As foreshadowed by *Policing the Crisis,* the policies of the time fed on stereotypes of a racially defined 'underclass' (Feeley and Simon, 1992).

Just as important in the period of Thatcherism was the growth of a consensus view that criminal justice was ripe for tough reforms. The arrival of New Labour, with its respectful attitude to US policies, led to innovation on a large scale.

These past decades have also been preoccupied by periodic threats of political violence, including mass bombings. Preventive measures targeting groups held to be associated with potential violence became an urgent focus of action. A decisive turn towards prioritising security took the form of preventive surveillance and detention for political actors deemed to be encouraging or fomenting violence. A fear of group violence was also conjured by the practices of joint enterprise prosecutions which extend responsibilities for serious crimes from 'principals' across a range of 'secondary suspects'. Again, the over-representation of minorities in these prosecutions seemed to signal the disciplining of an 'underclass' depicted in terms of ethnicity.

It has been argued that significant social anxieties swung public opinion behind stronger criminal justice measures (Pratt, 2002). The period after the financial crisis has seen more eruptions of populism as the 'elites' allegedly responsible have been challenged. As we saw with Brexit, a referendum is one of the most characteristic symbolic operations of populist politics, its advocates striving to attain an authoritative majority position. Responses to the management of the pandemic have revealed similar public suspicions of motives and actions by governments. The most significant effect of populist agitation has been to shore up established parties' devotion to those policies they claim to be popular.

As in the 1970s, fears of mass protest have been part of the law and order agenda pursued by the recent governments, together with changes in sentencing designed to increase time served. It is possible then to trace continuities in the socio-political context for criminal justice from the 1970s to the present, as political positions have evolved in response to long-term as well as conjunctural pressures. The politics of racism attained prominence, encouraging the targeting of criminal justice resources against an 'underclass'. These anxieties were part of the context for a number of initiatives to make sentences 'tougher', but also more managed, including the invention of the IPP sentence and its relatives in the rest of the UK.

B. Operations of law and administration: implementing 'risk management'

It is vital to grasp some of the regularities which characterise the operations of law and management of the indeterminately detained. Here the New Penology comes into its own, laying out, in effect, a technological agenda for confinement and control of the 'dangerous'. However, there are systematic challenges which undermine its claims and set the stage for management crises and damaging effects on individuals.

Designing extensive legal controls over the 'dangerous'

Populist governments want to show 'toughness' and to identify 'risky' populations and innovative measures which demonstrate their commitments. The ambitions of politicians for new and assertive measures were matched by a corresponding shift in legislation towards a managed system of controls, stretching over future actions. So it was not enough to punish retrospectively: orders and injunctions, backed by the threat of imprisonment, were designed to bear down on discreditable conduct; disqualifications also meant that citizen rights could be curtailed; a system of registration was made compulsory for those convicted of violent and sexual offences; licence provisions have been extended for those leaving prison. The accumulation of such measures has created a different rationale for sentencing which rests on assessments of future risks, rather than a focus on a given instance of culpability.

Combined and hybrid measures are attractive because they extend the time over which controls are operative. Indeterminate detention is developed as an approach combining a punishment tariff with preventive detention and long-term supervision - a pattern followed by a range of such sentences. Anti-social Behaviour Orders represent a hybrid legal form reversing that temporal sequence by threatening imprisonment for a breach of instructions to be followed in the community.

Indefinite periods of detention have long been part of certain sentences and, following the abolition of capital punishment, the establishment of tariff periods and the possibility of release on licence opened up new prospects for combining punishment with preventive detention in the same sentence and delegating decisions on release to administrative bodies. The combination principle then helped provide the template for new sentences given for matters other than formerly capital offences.

The ideology of public protection is applied in legislation so as to create criteria for identifying the 'dangerous' and the high-risk repeat lawbreaker. The drafting of law targeting a 'dangerous' population is subject to the influence of political drivers, which demand assurances about the reach and authority of the legislation over its subjects. The scope of the law is likely to err on the side of over-reach, however it is constructed. In the case of IPP, it has been asserted that ministers barely understood the risk paradigm they were intent on implementing (Annison, 2015). It is not accidental, therefore, that IPP was widely applied, generating a crisis of numbers at an early stage. The new IPP measures were found to have a very extensible capacity once subject to legal implementation: volumes rose rapidly despite tweaks to the criteria. All legislation designed under this political pressure always carries a potential for penal excess.

A New Penology in action

The increased severity of sentencing sanctions would not have taken its shape without a complementary knowledge framework which claimed to measure future risks with accuracy, identifying, for example, how far imprisonment could 'protect the public'. A purported science of risk prediction promised to put sanctions on a firm, protective footing, instead of using merely retribution and deterrence as justifications. By the 1990s, it was clear that the penal field was being populated by new 'techniques to identify, classify, and manage groupings sorted by dangerousness.' (Feeley and Simon, 1992). The knowledge base being developed was assumed to be capable of underpinning a realistic and responsive system of public protection. Similar ideas animated the legislation of forms of detention in the jurisdictions of the US and UK.

Equally, the framework foresaw an array of programmes which would effect changes in individuals, making it possible, in principle, for them to be safely released. The claims made for programmes were a special development of the general aspiration that prison regimes could mould character by instituting discipline based on constant surveillance (Garland, 1991). Expert knowledge was used to design methods that could be applied, tested and modified. Once the programmes had done their work, the expertise contained in specialist decision-making bodies was supposed to enable sound judgements to be made about who could be supervised in the community.

In the context of a New Penology, the policy framework for preventive detention includes, as an article of faith, support for a technology of risk assessment and 'reduction'. Given the attribution of dangerousness, it is not surprising that assessment turns out in practice to be the dominant factor, requiring a constant attention to specialist procedures. The machinery of programmes to be undertaken by subjects, though extensive in principle and a requirement for sentence progress, remains subordinate in practice. Assessments of risk tend to focus on static risk (which cannot be changed, such as childhood abuse), rather than on dynamic risks, such as poor mental health, which are capable of change, but are by no means necessarily reduced in the prison environment. But,

static risk is a group assessment and cannot discriminate the actual 're-offender' from the potential one. In Scotland the Order for Lifelong Restriction has raised similar questions about the role of professional assessment in serving the courts as well as the prisons.

The future-orientation of the new legal landscape was robustly confirmed by the development of preventive detention measures. In theory, risk assessment could create a foundation for decisions about release or recall. The application of programmes was meant to provide a clear indication of who was ready and who was not ready for release. At the same time, decisions to recall appeared now to be a matter for congratulation because heightened risk had been efficiently identified.

In general, for the indeterminately sentenced, promises of rehabilitation encounter the grim realities of imprisonment: limited services, unable to reduce the disabling effects of increasingly austere environments. For prisons and probation, security and supervision within a restricted environment of possibilities come first. With any tightening of resources, access to all services is reduced, with clear effects on motivation and well-being. The recent history of indeterminate sentences coincides with prison population pressures, financial austerity, and probation privatisation, which have given the lie to the promises of effective risk reduction through service provision. The promises of rehabilitative programmes have not been borne out. The empirical results of the programmes have been defended even by proponents on the limited grounds that they can have some effect, but are not panaceas. In addition, access to programmes on the scale required for large populations under indefinite detention has been chronically inadequate (Justice Committee, 2022).

For prisons, in particular, new sentences imply forms of sentence management, which have to be fitted into a rigid system controlling and administering a complex population. As resources are key to sentence progression, the detrimental impact of restrictive funding policies on all who seek parole has been widely recognised (Annison and Guiney, 2022).

Resort to imprisonment in these forms raises complex questions about criminal justice administration and its effectiveness. Yet imprisonment is inherently an opaque means of problem management, hindering external scrutiny, public examination, and democratic debate. Digging into the realities and rendering a true and comprehensive account are commonly challenging and difficult for all would-be justice reformers.

Holding hard to the fundamentals despite repeated crises

At significant points, the inability of institutions to deliver the results envisaged will incubate multiple crises (Lauder, 2024). Yet, established legal and policy forces resist coming to terms with their full implications.
For the courts, the challenge has been to apply decision-making criteria which were deliberately drafted in broad terms. As numbers multiplied, the government introduced modifications under the Criminal Justice and Immigration Act 2008 in order to manage the flow. It also had to take notice of an adverse judgement in the European Court of Human Rights (ECHR).

The combined effects of the factors in play created the first IPP crisis. The new government formed in 2010 legislated a compromise: abolition, but with continued application to existing cases. A new determinate sentence (EDS) was introduced. Thereafter, however, time served by those remaining on IPP grew longer and periods post-tariff increased.

The population subject to Crisis One now began to experience an emergent Crisis Two, with growing evidence of anxiety and despair. The review mechanisms (e.g. Parole Board) have been relatively under-resourced and insecure when faced with decisions about people legally designated as 'dangerous' (Justice Committee, 2022). While legislation can innovate, law monopolises and encloses emerging problems, denying fresh approaches and solutions, e.g. giving limited scope for re-investigation, appeals, and resentencing. It is, therefore, eminently possible for problems in criminal justice to continue and multiply as a result of a rigidity in the whole system, not simply because of the intentions of practitioners.

Hence, there have been many obstacles encountered by prisoners in general seeking to achieve redress or relief through law:

- Lack of an effective avenue to address fundamental rights, such as a strong and assertive constitutional court.
- Denials of civil legal aid to prisoners.
- Lack of clarity in law about the remit of the Parole Board.
- Government ministries' ambivalence towards 'arm's length' tribunals: in essence, 'they are independent, except when they are not' (Annison and Guiney, 2022).

The jurisprudence of combining punishment, security, and rehabilitation has posed some challenging questions for institutions of legal oversight, such as the ECHR. Given the problems in labelling people as dangerous and predicting how they might act after release, it has been argued that periods of preventive detention constitute arbitrary detention unless there is a benefit to the detained in terms of prospective integration into society; otherwise, they are being treated as means to an end and not as moral agents. Particular arguments within jurisprudence have sought to put preventive detention on a more assertive and definite foundation. However, scrutiny by external bodies has been intermittent in the UK, and has only appeared to have a decisive effect in the period preceding abolition of IPP, when it was confirmed by the ECHR that denial of rehabilitative opportunities amounted to arbitrary detention (James, Wells, and Lee v. the U.K.[1]). What would be helpful are clear judgements about the purpose and application of preventive detention as a whole; however, case law can often give only partial messages, and international agreements would make a stronger advance in creating effective standards. Here, the recent inquiries and comments of the UN Special Rapporteur on Torture on IPP could mark a threshold for change.

Looking at issues of indeterminacy on a broader canvas, we know too little about reactions to the various sentences in the UK and other jurisdictions which resemble IPP. We can, however, try to identify critical voices and monitor representations as well as legal claims.

1 (2013) 56 EHRR 399

Once a sentence is created, its application can easily outrun the intentions of legislators, but substantial reform becomes possible only when a policy window is opened, by, for example, the need to clear up legislative discrepancies, an international intervention, or the arrival of a reforming government. Even then, a new substitute measure can be crafted in place of the old, with little meaningful effect on the problem.

Reformers must therefore prepare the groundwork for change and try to identify opportunities, in full knowledge that legal redress can be slow and uncertain. Given the challenges, it would be useful to convene a representative working group to formulate relevant principles for sentencing with the primary aim of reintegration into society, as opposed to the foregrounding of risk. Obligations on the state to exercise strictly supervised and enforced restraints on any form of preventive detention must be a central feature. A group should include indefinitely detained individuals and their families, as well as judicial experts and criminal justice practitioners. The group's tasks will flow from the necessary reorientation of thinking about justice demanded by the established context of risk-based sentencing. In addition, a parallel group should be convened to study the upstream 'pipeline' into courts so that timely prior interventions can be identified, especially for mental health needs.

C. Initiatives, reactions and effects at the individual level

The individual level is not simply about idiosyncrasies, though they are possible and can be important; it is possible to trace regularities and patterns across a spectrum of initiatives, reactions and responses.

From time to time it has been possible to recognise at the leadership level what seemed like glimmers of hope. There has been an array of ministerial pronouncements during the history of IPP, some presaging definitive steps towards ending the sentence, some firmly defending its appropriateness. Looked at more broadly, the fluctuating attitudes reflect the dilemma of either obeying socio-political imperatives ('staying tough') or resolving systematic strains within law and administration ('rational management'). For example, the recent licence reforms implemented by the Labour government seem to represent a compromise, avoiding replacement of IPP, but retreating from the presumption of extended dangerousness many years beyond release. The Justice Committee report in 2022 was firmly on the side of rational public management, arguing that the sentences had to be replaced in the light of systematic failures. The new government faces its own dilemma: in introducing IPP, Labour endorsed the rationale of risk management, but now faces the disillusioned views of critics within its ranks. Confronting the crisis in prisons will be a major test of its openness to new thinking about risk, as well as its willingness to think harder about what sentencing as a whole means. The Sentencing Review appeared to mark a cautious step on that road. Making a more fundamental shift of this kind may be too much for any individual Minister to make; it will require a more structural realignment of social and political forces to ensure that IPP is firmly abandoned and a repeat never occurs.

Within the criminal justice system, opinions have ranged from the resigned, to the sceptical and the concerned, as reflected in practitioner and inspection reports, including a large number submitted to the Justice Committee inquiry. Some have come to criticise the system, for example, recognising the demoralising effect of the sentences. Academics within the profession of law have also questioned the underlying philosophy and consistency of such legislation. There is great scope for tapping into these reactions and encouraging candid

testimony from official actors. Another avenue of inquiry is to identify allies in official and professional circles, who may be able to facilitate access to research subjects and data held by official agencies of care, decision-making, and inspection.

Among those subjected to the IPP sentence, individual cases have come to stand as illustrations of the dismaying results of risk-oriented sentencing extending years beyond any tariff. Across the population, these effects have crystallised into patterns of anxiety and a reduced sense of self-efficacy, which are linked to the label of dangerousness stamped on them by the system. Individual reactions have depended on their personal characteristics as well as the ways they have been treated. We know that many will have carried the stressful burden of multiple Adverse Childhood Experiences, causing negative effects upon trust in others.

The many concerning individual cases deserve close attention because they contain narratives which reveal the ways in which multiple actors have intervened or failed to act. Such cases should not be allowed to disappear into obscurity; they can be the focus of very concrete questions, with the aim of exposing the sequences of neglect that have characterised their treatment. Their stories will contribute to our awareness of what maltreatment under the United Nations' *Convention Against Torture* actually means. It is also necessary to make sure that the study of neglect does not ignore the 'hard cases', where offences repugnant to most observers have been committed, and lessons about rights and humane treatment still need to be learned on the basis of international experience.

Being consistently labelled and treated as an individual member of a dangerous group has challenged the self-concepts and sense of justice of those sentenced to IPP, especially as, after abolition, they are increasingly without counterparts in the correctional system. The consequences have played out in terms of disturbing rates of self-harm and suicide ,as well as disengagement from the formal institutions of sentence management. Even after attaining release, the burdens of supervision have become agonising for many, as they realise that the sentence may have no end. Crucially, those effects are attributable to a system which undermines hope and frays the sense of justice (Grimshaw, 2022).

Conclusion: a note of optimism

Gaining a satisfactory vantage point on a problem requires more than one step back from its immediate appearance. The threefold analysis of levels here bears similarities with another contemporary discussion of blocks to criminal justice reform, by Harry Annison and Thomas Guiney (2023), in which the individual, institutional, and systemic levels are distinguished.

A contextual analysis should not be disappointing for proponents of change if it reveals points of resistance and challenge to the tenets of authoritarian populism, as well as to the unfolding crises of preventive detention.

This discussion started with a consideration of state, society and law. It has identified social forces in play which have sought to recruit a range of social groups to join a common call for order. How then are social groups to be encouraged to listen to an alternative, more humane and realistic view? Part of the challenge is to find a way to step outside the narrow frame of political competition, which as we have seen tends to accelerate the flight

towards order. Demonstrating the scope and reach of preventive measures, combined with success in highlighting their contradictory consequences, will speak to public perspectives on the fairness of criminal justice. It has been influentially asserted that public consent to criminal justice intervention depends on a widely held opinion that its practices are legitimate (e.g. Tyler, 2017). If it is to have public traction, the argument about indefinite detention cannot simply be confined to the debating chambers, it needs to be geared to ideas and opinions about justice among the public, especially those directly touched by the crises within society –poverty, mental health, housing, sex and gender inequality, etc.

As well as producing evidence, a key task for reformers is to articulate a new 'common sense' about crime and punishment which connects values and evidence in ways that can appeal to a wide coalition within the population, and can therefore influence elected politicians and assemblies.

Another dimension of agitation for reform is a willingness to engage with parliamentary and regulatory discussion, leading to the drafting of new legislation and guidance. As we have seen, the failed promises of indeterminate detention schemes must be acknowledged so that more realistic and balanced responses to serious issues of public protection can be articulated.

Finally, there is the task of eliciting the voices of individuals affected by the crises of indeterminacy. Criminal justice supervision normally suppresses the voices of those it purports to enable and change. Projects of witnessing, for individuals and families, should contribute to the education of public opinion and to the design of reforms. The social and psychological effects of indeterminate imprisonment and supervision should be vocalised in crystal clear fashion so that policy audiences can listen and explore much needed alternatives.

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